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Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID C. ROWLANDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether federal courts possess jurisdiction to grant the expungement of a valid federal conviction pursuant to their inherent equitable powers.

Whether the All Writs Act, 28 U.S.C. § 1651(a), provides federal courts with statutory authority to grant expungement of a federal conviction.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. David C. Rowlands
2. United States of America

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PETITION FOR WRIT OF CERTIORARI

David C. Rowlands respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 9, 2006 and the Order Denying his Petition for Rehearing on July 10, 2006.

CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Third Circuit (App. 1-11) is reported at *Rowlands v. United States of America*, 451 F.3d 173 (3d Cir. 2006). The district court's initial opinion (App. 12-19) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2006 and the Order Denying Mr. Rowlands' Petition for Rehearing was entered on July 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

1. Petitioner David C. Rowlands had been an educator throughout much of his adult life, having received a Bachelor's Degree in Social Studies and an elementary education certification in 1965. Additionally, Mr. Rowlands became involved in politics, first being elected to the City Council of Kearny, New Jersey and later becoming Mayor of that City.

2. The political positions held by Mr. Rowlands were part-time, allowing him to simultaneously continue his career in education, in which he ascended from teacher to Vice-Principal to Principal to Assistant Superintendent.

3. In the spring of 1979, a local businessman applied to the Kearny Planning Board for permission to subdivide his property.

4. Mr. Rowlands, as well as co-defendant Edmund Grimes, were members of that Board. In order to facilitate approval of the application, a deal was brokered which ultimately led to Messers. Grimes and Rowlands being paid $12,000 to influence the Board.

5. As a result of the payment, in March 1982, Mr. Rowlands was convicted of conspiring to obstruct and delay interstate commerce by extortion, pursuant to 18 U.S.C. § 1951, knowingly attempting to obstruct and delay interstate commerce by extortion, pursuant to 18 U.S.C. §§ 1951 & 1952, and knowingly attempting to influence and obstruct a United States Grand Jury Investigation, pursuant to 18 U.S.C. § 1503. He was sentenced to eight (8) years in prison.

6. Some ten (10) months later, the Honorable Herbert J. Stern, United States District Judge, heard a motion

to reduce the sentences, pursuant to Federal Rule of Criminal Procedure 35, as then applicable, of Messers. Rowlands and Grimes. Present at the hearing were Assistant United States Attorneys Peter Bennett and W. Hunt Dumont as well as Mr. Grimes' defense counsel. Mr. Rowlands' defense attorney, however, was not present.

7. Nonetheless, since there were no objections to doing so, Judge Stern proceeded with the hearing without Mr. Rowlands having representation.

8. At the hearing, not only did Mr. Grimes' defense attorney argue for a sentence reduction, but both federal prosecutors also lobbied for early release, praising both men for their courage and veracity.

9. Judge Stern, moved by the evidence and argument, determined that after serving only ten (10) months in prison, Messrs. Grimes and Rowlands had "made amends" to society, making their continued incarceration unnecessary and unjust. Judge Stern ordered that both men be immediately released.

10. Because Mr. Rowlands did not have representation at the sentence reduction hearing, the issue of whether the conviction should serve as a permanent forfeiture of his New Jersey teaching license was never raised. Neither the sentencing Judge nor the Assistant United States Attorneys intended for Mr. Rowlands to lose his teaching license. Indeed, lead prosecutor Peter Bennett later explained in a letter written in support of Mr. Rowlands' subsequent attempt to regain his teaching privileges:

> I am confident that none of the parties informed Judge Stern of the devastating consequences Mr.

> Rowlands' conviction would have on his teaching certification. Had they done so, I have no doubt that Judge Stern would have entered an Order to prevent the drastic consequence of permanent disability.

11. Mr. Bennett reiterated the same point in an affidavit submitted in support of Mr. Rowlands' petition for a Pardon:

> I have every reason to believe that the sentencing Judge would have restored those rights had the issue been presented to him ... For that oversight, [David Rowlands] has been barred from a profession badly in need of quality teachers. At this point, both Mr. Rowlands and the citizens of the State of New Jersey are paying the price for this oversight.

12. The Presiding Judge shared the prosecutor's view. Judge Stern explained in a letter written after Mr. Rowlands was released, "I certainly hope that something can be done for Mr. Rowlands as I believe that it would be very unfair to continue to punish him now that his debt to society has been fully paid."

13. In January, 2005, Mr. Rowlands petitioned the United States District Court for the District of New Jersey for an expungement of his criminal record. The petition asked the district court to exercise the authority afforded it by the All Writs Act, 28 U.S.C. § 1651, or its inherent equitable powers, to expunge Mr. Rowlands' criminal record.

14. The Petition was denied. The district court never considered whether Mr. Rowlands deserved an expungement, instead ruling that it lacked jurisdiction under

either the All Writs Act or the inherent equitable powers doctrine to grant the requested relief.

15. The district court opinion was challenged in the United States Court of Appeals for the Third Circuit. In a published opinion dated June 9, 2006, the Third Circuit considered for the first time whether the All Writs Act authorizes a federal court to grant an expungement on purely equitable grounds – and ruled that it does not. *United States v. Rowlands*, 451 F.3d 173, 178 (2006).

16. Additionally, the Third Circuit joined a minority of circuits holding that federal courts cannot use their inherent equitable powers to expunge a valid conviction. *Id.* at 179.

REASONS FOR GRANTING THE PETITION

Millions of citizens suffer a life-long handicap as a result of a one-time lapse in judgment. Indeed, even a single criminal arrest or conviction can forever affect an individual's right to vote, employment opportunities, and social standing. The question of significant public importance presented here is whether federal judges possess the authority to, within the prudent exercise of their discretion, grant an expungement in those instances where the dangers of unwarranted adverse consequences outweigh the public interest in maintenance of criminal records.

Underlying this question is the principle that federal courts possess power over their own records. United States District Courts are "courts of record." And, as courts of record, they have control over their own judgments, records, decrees, and orders. They have the power, for

example, to enforce compliance with decrees lawfully executed or to modify decrees in response to changed conditions. They have the power to recall mandates, or to correct clerical errors in a signed judgment. Such powers, along with many others, are well-established, though many are not specifically authorized by the Constitution, statutes or rules of procedure. Rather, these processes are fashioned by the courts themselves as tools necessary to achieve substantial justice.

Whether federal courts in fact have the power of expungement is a matter that has divided the Circuits. Most Courts of Appeals have ruled that federal courts do possess the power to expunge a valid conviction. Thus, the Courts of Appeals in the Second, Fourth, Sixth, Seventh, and District of Columbia Circuits have concluded that federal courts have the inherent equitable power to order an expungement.[1] By contrast, the Courts of Appeals for the Third, Eighth and Ninth Circuits have held that federal courts lack such power.[2] This deep division among the circuits, on an issue that so fundamentally implicates the scope of federal court power, requires that a writ of certiorari issue.

Likewise, the question of federal court authority to expunge convictions implicates the vitality of this Court's

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[1] *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004); *United States v. Robinson*, 79 F.3d 1149 (6th Cir. 1996); *United States v. Doe*, 892 F.2d 1042 (4th Cir. 1989); *Livingston v. United States Dept. of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985); *United States v. Schnitzer*, 567 F.2d 536, 538 (2d Cir. 1977).

[2] *United States v. Rowlands*, 451 F.3d 173 (3d Cir. 2006); *United States v. Meyer*, 439 F.3d 855, 862 (8th Cir. 2006); *United States v. Crowell*, 374 F.3d 790, 793, 795-97 (9th Cir. 2004).

precedents. In *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977), this Court made clear that under the All Writs Act, 28 U.S.C. § 1651(a), a federal court may take whatever action is necessary to achieve justice unless that action is prohibited by Congress. Notwithstanding that decision, the Third Circuit here ruled that federal courts lack the power to expunge court records, even though Congress has never prohibited such action. For this additional reason, this Court should grant certiorari to, for the first time, decide whether the All Writs Act authorizes a federal court to expunge a criminal conviction on equitable grounds.

A. Federal Courts Possess Jurisdiction to Award an Expungement Pursuant to Their Inherent Power to Order Equitable Relief.

1. Expungement involves a trade-off between competing interests. An individual wishes to pursue employment, housing, or other major life activities without the stigma of a record of arrest or conviction. Society has an interest in maintaining accurate criminal records for purposes of future crime investigations, job screening and otherwise. At issue here, is the federal judiciary's power – or lack thereof – to expunge the records of the one and only criminal arrest and conviction of a fully reformed and rehabilitated individual.

2. Many states have addressed this issue by enacting statutes governing the criteria and procedures by which state courts may expunge the criminal records of an

individual who has proven his rehabilitation.[3] Congress has yet, however, to finalize a statute governing the expungement of records for fully rehabilitated individuals previously convicted of *federal* crimes.[4]

3. In the absence of a statute, federal courts have long considered expungement as a matter of exercising their inherent equitable powers. The doctrine of "inherent powers" enables federal courts to act where necessary to effect justice, notwithstanding the absence of statute or court rule. *Soo Line R.R. v. Escanaba & Lake Superior R.R.*, 840 F.2d 546, 551 (7th Cir. 1988); *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978).

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[3] Arizona Revised Statutes § 13-907; Cal. Penal Code § 1203.4; Florida Statutes Annotated § 943.0585; Idaho Code Annotated § 19-2604; Illinois Compiled Statutes Annotated 2630/5; Kentucky Revised Statutes § 431.078; Louisiana Statutes Annotated § 44:9; MD Code, Criminal Procedure § 10-105; Michigan Compiled Laws Annotated § 780.621; Minnesota Statutes Annotated § 609A.01, et seq.; Vernon's Annotated Missouri Statutes § 610.122; New Hampshire Revised Statutes § 651:5; New Jersey Statutes Annotated 2C:52-2; Oklahoma Statutes Annotated § 18; Ohio Revised Code § 2953.32; Oregon Revised Statutes Annotated § 137.225; 18 Pa. C.S.A. § 9122; Rhode Island General Laws § 12-1.3-2; Code of Laws of South Carolina § 22-5-910; Tennessee Code Annotated § 40-32-101; Virginia Code Annotated § 19.2-392.2; Vernon's Texas Statutes and Codes Annotated Art. 55.01; Revised Code of Washington Annotated § 9.95.240; Wisconsin Statutes Annotated § 97.015.

[4] Recently, H.R. 662, titled "Second Chance for Ex-Offenders Act of 2005" was introduced in Congress. This proposed bill would amend the Federal Criminal code to allow an individual to file a petition for expungement of a record of conviction for a nonviolent criminal offense if such individual has fulfilled all of the requirements of his sentence, has never been convicted of a violent offense and has never been convicted of a nonviolent offense other than the one for which expungement is sought. The proposed bill also directs the court, in ruling on such petition, to weigh the petitioner's interests against the best interests of justice and public safety.

This power vests in the courts upon their creation, *Michaelson v. United States*, 266 U.S. 42, 66 (1924), and does not derive from any statute. *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962).

4. Federal Courts have exercised their inherent powers in a wide variety of circumstances, in the interests of efficiency, fairness, or necessity to fully effectuate their own power, rules, and jurisdiction over the attorneys and parties appearing before them. That Congress may have enacted a statute that touches upon an area does not preclude a court from exercising its inherent equitable powers to fill in the gaps. For example, federal courts have the inherent power to sanction attorneys, *see In re Prudential Ins. Co. America Sales Practice Litig. Agent*, 278 F.3d 175, 181 (3d Cir. 2002), even though there are rules and statutes that address the same issue. *See, e.g.,* Fed. R. Civ. P. 11; Fed. R. Civ. P. 37; 28 U.S.C. § 1927. Similarly, the Supreme Court has expressly held that there is an "inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress. . . ." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975); this is so notwithstanding that there are federal statutes earmarking specific fee-shifting situations. *See, e.g.*, 15 U.S.C. § 77k(e); 42 U.S.C. § 2000a-3(b).

5. While the inherent powers doctrine has been employed in a wide variety of situations, those circumstances fall into three categories. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 (3d Cir. 1985). First, because Article III vests general judicial powers in courts created by Congress, there are certain powers deemed so fundamental that "to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power.'" *Id.* These powers are steeped

in the concept of separation of powers and may include voiding legislation that requires a written decision in every case, declares a time period in which every case must be heard, or provides for the automatic disqualification of judges upon the application of a party. *Id.* at 562, n.7 (citing authorities).

6. Second, federal court inherent power may arise from functional necessity. This aspect of inherent power has been described as permitting the court to take any action "necessary to the exercise of all others." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812)). Under this usage falls instances where the Court must use its power to perform acts essential to the administration of justice and the functioning of the judiciary. *Levine v. United States*, 362 U.S. 610 (1959). Examples include the power to punish contempt, *Michaelson*, 266 U.S. at 65, and the power to appoint "persons unconnected with the court to aid judges in the performance of specific judicial duties." *Ex parte Peterson*, 253 U.S. 300, 312 (1920).

7. Third – and most relevant here – federal courts invoke their inherent powers when necessary to obtain just and fair results. *Eash*, 757 F.2d at 563. For example, courts utilize their inherent equitable powers to enforce a judgment even in a case previously closed, *Peacock v. Thomas*, 516 U.S. 349, 356 (1996), to grant bail in a situation not dealt with by statute, *Johnson v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955), to protect trade secrets in *ex parte* appeals, *In re Sarkar*, 575 F.2d 870 (C.C.P.A. 1978), to subpoena witnesses for an indigent civil litigant, *Estep v. United States*, 251 F.2d 579, 582 (5th Cir. 1958), or to order an employer to continue paying an employee her full salary during a lengthy trial where the employee served as

an alternate juror, *United States v. Adamita*, 701 F.Supp. 85 (S.D.N.Y. 1988).

8. It is this third category, whereby federal courts exercise their inherent equitable powers to achieve justice that, many federal courts have concluded, includes the power to grant an expungement. *See, e.g., United States v. Doe*, 892 F.2d 1042 (4th Cir. 1989) ("federal courts have an inherent power to expunge criminal records"); *Livingston v. United States Dept. of Just.*, 759 F.2d 74, 78 (D.C. Cir. 1985) ("It is well established, and undisputed by the parties to this case, that courts have the inherent, equitable power to expunge arrest records"); *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), *cert. denied*, 435 U.S. 907 (1978) ("expungement lies within the equitable discretion of the court"); *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974) ("[t]he judicial remedy of expungement is inherent and is not dependent on express statutory provision"); *United States v. Rabadi*, 889 F.Supp. 757, 759 (S.D.N.Y. 1995) ("it is well-established that federal courts may, through the exercise of their inherent equitable powers, order the expungement of criminal records); *Schwab v. Gallas*, 724 F.Supp. 509, 510 (N.D. Ohio 1989) ("the remedy of expungement invokes a federal court's equitable jurisdiction").

9. As is appropriate in the exercise of this type of equitable power, courts considering expungement have performed "the 'delicate balancing of the equities between the right of privacy of the individual and the right of law enforcement official to perform necessary duties.'" *Schnitzer*, 567 F.2d at 539 (citing *United States v. Rosen*, 343 F.Supp. 804, 806 (S.D.N.Y. 1972)). *See also Diamond v. United States*, 649 F.2d 496, 499 (7th Cir. 1981) ("[i]f the dangers of unwarranted adverse consequences to the

individual outweigh the public interest in maintenance of records, then expunction is appropriate"); *United States v. Fields*, 955 F.Supp. 284, 285 (S.D.N.Y. 1997) (when deciding whether to grant expungement "the government's interest in maintaining arrest records must be balanced against the harm that the maintenance of arrest records can cause citizens").

10. An example of this type of balancing is *United States v. Doe*, 935 F.Supp. 478, 480 (S.D.N.Y. 1996). There, the defendant moved the district court to order the expungement of a 1976 conviction for making false claims to the Social Security Administration. During the twenty years between his conviction and expungement application, the defendant had become a productive citizen, been educated in the field of computer software and written programs for a number of major corporations. *Id.* at 480. His progress continued until 1996, when, after obtaining a position as a Computer Programmer/Systems Analyst for Chemical Bank, a background check was performed. Realizing that the twenty-year-old conviction could disqualify him from other job opportunities, the defendant sought an expungement. In granting the relief requested, the district court explained, in language especially applicable to this case:

> First, defendant's conviction occurred twenty years ago. Since that time, he has not had any incidents with the law and has been gainfully employed as a computer programmer. Second, unlike similar cases where courts have refused to expunge records of conviction, defendant has demonstrated that this ancient conviction has had an actual impact on his employment status.

Id. at 480-81. *See also United States v. Javanmard*, 767 F.Supp. 1109 (D.Kan. 1991) (ordering expungement where defendant was productive citizen for eight years following conviction and presence of criminal record caused denial of defendant's application for amnesty); *United States v. Bohr*, 406 F.Supp. 1218, 1220 (E.D. Wisc. 1976) (granting expungement because defendant led a law-abiding life for the eleven years following his arrest and the presence of a criminal record would cause difficulty in his attempt at admission into the Arizona bar and obtaining certain civil service positions).

11. By contrast, other courts, performing the same type of "delicate balancing" have denied motions to expunge. *See, e.g., United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004); *United States v. Wiley*, 89 F.Supp. 2d 909, 910-11 (S.D. Ohio 1999); *United States v. Fields*, 955 F.Supp. 284 (S.D.N.Y. 1997). Here, however, the Third Circuit Court of Appeals refused even to perform the balancing described above. Rather, while recognizing a federal court's jurisdiction to expunge criminal records "where the validity of the underlying criminal proceeding is challenged," *United States v. Rowlands*, 451 F.3d 173, 177 (3d Cir. 2006), the court held that it lacked jurisdiction to entertain an expungement application sought on equitable grounds. *Id.* at 178. The Third Circuit's reasoning is suspect, as "jurisdiction" does not usually turn on the basis for the relief granted: courts either possess the power to expunge or they do not. *See United States v. Rodgers*, 466 U.S. 475, 479-80 (1984) (describing "jurisdiction" as the power to exercise authority."). Because some courts hold

that they do,[5] and others that they do not,[6] certiorari should be granted to resolve this conflict. And because federal courts, consistent with their long tradition, have equitable powers to do justice, the Court should reverse the decision of the United States Court of Appeals for the Third Circuit and hold that federal courts possess authority to expunge a conviction in appropriate cases.

B. The All Writs Act, 28 U.S.C. § 1651(a) Authorizes a Federal Court to Award an Expungement on Equitable Grounds

1. The All Writs Act was originally codified in § 14 of the Judiciary Act of 1789, 1 Stat. 81-82, which provided that:

> All the . . . courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

This Court's early jurisprudence was to the effect that the All Writs Act was designed to fill the "interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Correction v. United States Marshals Service et al.*, 474 U.S. 34, 41 (1985) (citing *McClung v. Silliman*, 6 Wheat. (19 U.S.) 598, 5 L.Ed. 340 (1821);

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[5] *United States v. Flowers*, 389 F.3d 737 (7th Cir. 2004); *United States v. Robinson*, 79 F.3d 1149 (6th Cir. 1996); *United States v. Fields*, 955 F.Supp. 284 (S.D.N.Y. 1997).

[6] *United States v. Rowlands*, 451 F.3d 173 (3d Cir. 2006); *United States v. Pinto*, 1 F.3d 1069 (10th Cir. 1993).

McIntire v. Wood, 7 Cranch (11 U.S.) 504, 3 L.Ed. 420 (1813)). The phrase "not specifically provided for by statute" remained until 1948. Congress then consolidated various provisions into Section 1651, making "necessary changes in phraseology" but without substantive amendment. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess., A144 (1947). Thus, "although Congress dropped the phrase 'not specifically provided for by statute' in its 1948 consolidation, . . . it apparently intended to leave the all writs provision substantially unchanged." *Pennsylvania Bureau of Correction*, 474 U.S. at 41.

2. The current version of the Act provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651.

3. The reach of the All Writs Act was addressed in *United States v. Morgan*, 346 U.S. 502 (1954). There, the defendant was convicted of a federal crime and sentenced to four years in prison. *Id.* at 503. Defendant served his full sentence. *Id.* Seven years after completion of his sentence, the defendant was convicted of attempted burglary in New York state court. *Id.* at 513. The previous federal conviction caused the defendant to be sentenced under New York's multiple offender laws and thus sentenced to a much longer term for the state offense. *Id.* at 503-04; 513.

4. Approximately fourteen months after his state conviction, the defendant filed a motion in the United States District Court seeking to vacate the federal conviction

because he did not have counsel and was not informed of his right thereto. *Id.* Defendant so moved notwithstanding that he had been subject to a final judgment of conviction, had long before satisfied the sentence imposed upon him, and was no longer subject to the control of the court. *Id.* at 504; 513.

5. The federal court's authority to consider the propriety of his by-now ancient conviction was not covered by any statute or court rule. Nonetheless, looking to the All Writs Act as authority, this Court determined that the defendant could properly move to vacate his federal conviction. *Id.* at 512-13. In addressing the issue of jurisdiction, the Court explained that the defendant's motion was "a step in the criminal case," rather than a separate proceeding, *id.* at 506, n.4, and that jurisdiction arose from the original grant of jurisdiction over the case.

6. This Court again considered the breadth of the All Writs Act in *United States v. New York Tel. Co.*, 434 U.S. 159 (1977). There, the district court authorized the FBI to install and use pen registers on two phones believed to be used in an illegal gambling enterprise. *Id.* at 161-62. In addition to ordering installation of the pen registers, the Court directed the telephone company to give the FBI "all information, facilities and technical assistance" necessary. *Id.* at 167. The telephone company refused to fully comply and filed a motion to vacate a portion of the order on the ground that no such order could be used unless it met the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*

7. It was undisputed that Title III pertained only to orders "authorizing or approving the interception of a wire or oral communication" and did not govern the use of pen

registers because pen registers do not "intercept" or acquire communication contents. *Id.* at 165-66. Moreover, the legislative history of Title III showed that the definition of "intercept" was purposely designed to exclude pen registers. *Id.* at 166-68.

8. Since neither Title III, nor any other statute or court rule permitted the district court to authorize use of pen registers, this Court again looked to the All Writs Act. After satisfying itself that there was no statute prohibiting the use of pen registers, the Court ruled that the All Writs Act provided a basis for the district court's order. In language probative of the reach of the All Writs Act and particularly relevant in this case, the Court explained that "'[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.'" *Id.* at 172-73 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)).

9. No statute prohibits a district court from expunging an arrest and conviction record, and, as *New York Tel.* instructs, a federal court can therefore take whatever action is necessary to achieve justice, since expungement is not prohibited by Congressional mandate. Indeed, all parties, and the Third Circuit Panel examining this case, agreed that the All Writs Act can be properly used to vacate convictions deemed "invalid," either based upon a dispositive change in the law created by a subsequent Supreme Court decision or upon a fundamental error affecting the integrity of the conviction. *Rowlands*, 451 F.3d at 177. *See also United States v. Russo*, 358 F.Supp. 436 (D.N.J. 1973) (using powers granted by 28 U.S.C.

§ 1651(a) to vacate conviction after completion of sentence because of Supreme Court's subsequently explained interpretation of the Fifth Amendment); *Nicks v. United States*, 955 F.2d 161, 167 (2d Cir. 1992), *on remand*, 874 F.Supp. 591 (S.D.N.Y. 1995) (relying upon 28 U.S.C. § 1651(a) to vacate a conviction because trial court failed to hold a required competency hearing); *United States v. Loschiavo*, 531 F.2d 659, 666-67 (2d Cir. 1976) (conviction vacated pursuant to the All Writs Act because federal offense "never existed" based on subsequent Supreme Court decision).

10. There is disagreement in the courts, however, about whether the All Writs Act authorizes a district court to expunge a criminal conviction on purely equitable grounds. Appellate Courts in the Third and Tenth Circuits have concluded that the All Writs Act does not authorize the expungement of a valid arrest and conviction. *See United States v. Rowlands*, 451 F.3d 173 (3d Cir. 2006); *United States v. Pinto*, 1 F.3d 1069 (10th Cir. 1993). But this position is not universally accepted. *See United States v. Bohr*, 406 F.Supp. 1218, 1219 (E.D. Wisc. 1976) (holding that the All Writs Act empowers a district court to issue whatever orders are necessary to effect complete justice in its cases, and provides "authority to order expunction of criminal records where circumstances demand such action.") (citing *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970) and *Kowall v. United States*, 53 F.R.D. 211, 213 (W.D. Mich. 1971)).

11. This Court should resolve the conflict. Ultimately, the better analysis is that there is no jurisdictional distinction between the expungement of an invalid conviction and the expungement of a conviction on purely equitable grounds. Expungements are not proscribed by Congress

and should be allowed. Accordingly, this Court should award certiorari in order to once and for all explain the reach of federal court power to grant an expungement pursuant to the All Writs Act.

CONCLUSION

For the reasons set forth above, Petitioner David C. Rowlands respectfully requests that the Court grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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David C. Rowlands

Dated: October 9, 2006

United States Court of Appeals,
Third Circuit.
UNITED STATES of America
v.
David C. ROWLANDS, Appellant.
No. 05-3425.
Argued April 21, 2006.
Filed June 9, 2006.

Lawrence S. Lustberg, Fruqan Mouzon, (Argued), Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, NJ, for Appellant.

Christopher J. Christie, United States Attorney, George S. Leone, Chief, Appeals Division, David B. Lat, Mark E. Coyne (Argued), Assistant United States Attorneys, Newark, NJ, for Appellee.

Before SLOVITER and AMBRO, Circuit Judges, and DuBOIS,* District Judge.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

This case presents the question of whether federal courts have the power to authorize expungement of a criminal record where the legality of the underlying criminal conviction is not being challenged. The District Court denied the application of Appellant David C. Rowlands for expungement of his 1982 conviction of several white collar crimes. On appeal, Rowlands contends that the District Court erred in holding that it lacked jurisdiction

* Hon. Jan E. DuBois, Senior Judge, United States District Court for the Eastern District of Pennsylvania.

over his petition for expungement either pursuant to its inherent power to order equitable relief or pursuant to the All Writs Act.

I.

David Rowlands was a public official and employee of the town of Kearny, New Jersey. He served, at various times, as a Councilman and Mayor of Kearny. Unbeknownst to Rowlands, another Kearny public official solicited a bribe of $12,000 in cash from Richard Mace, the owner of a furniture store.** In exchange for the bribe, Richard Mace was promised approval of his plans to build additional showrooms. Rowlands received $6,000 in cash, and the remainder of the bribe was kept by another public official.

Rowlands was subsequently indicted and, following a jury trial, he was convicted of conspiring to obstruct and delay interstate commerce in violation of 18 U.S.C. § 1951, knowingly attempting to obstruct and delay interstate commerce by extortion, in violation of 18 U.S.C. § 1951-52, and knowingly attempting to influence and obstruct a federal grand jury investigation, in violation of 18 U.S.C. § 1503. Rowlands was sentenced to eight years in prison. In explaining this sentence, the District Court stated: "I was morally certain that the way they were operating in that community on that one transaction indicated to me that they were in business and that there was a lot more to Messrs. Rowlands and Grimes than the $6,000 they each took from Mr. Mace." App. at 31-32. Nonetheless,

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** Counsel advises that Mr. Mace immediately reported the solicitation to the Federal Bureau of Investigation.

after Rowlands had served only ten months, the District Court reduced Rowlands's sentence to time served. Two Assistant United States Attorneys who had prosecuted Rowlands on behalf of the Government urged reduction of Rowlands's sentence because of his significant post-sentencing cooperation in the Government's investigation and prosecution of others. At the sentence reduction hearing, the District Court noted, "I am satisfied, morally and beyond any shadow of a doubt that these two men have fully cooperated and have done everything they could do to be honest, truthful and helpful, and to make amends." App. at 33. While a co-defendant's defense lawyer was present at the hearing, Rowlands's defense lawyer was not.

Since Rowlands's release from prison in 1983, he has been gainfully employed in the retail automobile industry as a salesman and manager. In 1990, he sought reinstatement of his teaching certificate, which had been revoked pursuant to New Jersey law, because of his conviction. *See generally* N.J.S.A. 18A:6-38. Two Assistant United States Attorneys who prosecuted Rowlands on behalf of the Government wrote letters on Rowlands's behalf. One wrote to the New Jersey State Board of Examiners and urged the Board to "exercise lenity" and reinstate Rowlands's teaching certificate. The other sent a letter that stated, "While there is no question that Mr. Rowlands was properly convicted of serious crimes, there is also no question that he has been punished for those crimes and that he has done all within his power to make restitution. . . . It is my personal hope that David Rowlands' past criminal activity will not be a permanent impediment to meaningful and rewarding employment and community service in the future." App. at 36. In 2005, the State Board of

Examiners declined to reinstate Rowlands's teaching certificate or to recertify him.

Rowlands then turned to the courts. In January 2005, Rowlands petitioned the United States District Court for the District of New Jersey for an expungement of his criminal record. Rowlands contended that the District Court had jurisdiction over his petition pursuant to its inherent equitable power and pursuant to the All Writs Act, 28 U.S.C. § 1651. The District Court dismissed the petition, concluding that neither its inherent equitable powers nor the All Writs Act provided it with jurisdiction over Rowlands's petition. On July 8, 2005, Rowlands timely filed his notice of appeal with this court.

On this appeal, Rowlands explains that he seeks expungement of his record in order to gain recertification as a teacher. He contends that because his defense attorney was not present at his reduction of sentence hearing, the issue of whether his conviction should serve as a permanent forfeiture of his New Jersey teaching license was never raised.

This court has twice previously considered the question of whether federal courts have the power to authorize expungement of a criminal record. See *United States v. Noonan,* 906 F.2d 952 (3d Cir.1990); *United States v. Dunegan,* 251 F.3d 477 (3d Cir.2001). Rowlands contends that these decisions are "contradictory." Appellant's Br. at 9. We revisit the issue now to clarify our jurisprudence.

II.

A defendant who moves to expunge his or her conviction does not seek to vacate or set aside the conviction.

Rather, s/he seeks "[t]he judicial editing of history." *Rogers v. Slaughter,* 469 F.2d 1084, 1085 (5th Cir.1972) (per curiam). Although different states may define "expungement" differently, "in general when a defendant moves to expunge records, she asks that the court destroy or seal the records of the fact of the defendant's conviction and not the conviction itself." *United States v. Crowell,* 374 F.3d 790, 792 (9th Cir.2004).

Rowlands contends that this court's jurisprudence regarding expungement is inconsistent. He notes that in *United States v. Noonan,* we stated, "Clearly, a federal court has the inherent power to expunge an arrest and conviction record." 906 F.2d 952, 956 (3d Cir.1990). However, eleven years later, in *United States v. Dunegan,* "we h[e]ld that in the absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record, even when ending in an acquittal." 251 F.3d 477, 480 (3d Cir.2001). According to Rowlands, "The *Dunegan* panel's conclusion was in direct contradiction to the earlier *Noonan* decision." Appellant's Br. at 19. We find this argument unconvincing. A close reading of *Noonan* and *Dunegan* demonstrates that the two opinions are not in conflict.

In his case, Noonan sought expungement of his conviction of violation of the Military Selective Service Act. Noonan's argument that his record should be expunged was predicated on the premise that "a Presidential pardon has the force of wiping out guilt." *Noonan,* 906 F.2d at 958. Therefore, he contended the presidential pardon, restoring to him "full political [and] civil rights as well as 'other rights' constituted the legal authority for expunging his

criminal conviction." *Id.* at 955 (alteration in original) (internal quotation marks omitted). We rejected the argument that "the President has the ability, through the pardon power vested under Article II, § 2, to tamper with judicial records." *Id.* at 956. We stated that such an idea "flies in the face of the separation of powers doctrine." *Id.* After noting that in inquiring into the effect of a pardon on a valid conviction record we were writing on a clean slate, we stated: "The collective experience of our judiciary reflected by reported cases, however, discloses that expunction of criminal court records is an extraordinary remedy. Clearly, a federal court has the inherent power to expunge an arrest and conviction record." *Id.* Rowlands relies on the latter sentence as the basis for his claim that we have jurisdiction. Significantly, in *Noonan* we ultimately held that a presidential pardon did not entitle Noonan to expungement of his criminal record.

Rowlands is mistaken in his contention that *Noonan* holds that this court has jurisdiction over any and all petitions for expungement. Our holding in *Noonan* was not nearly that broad. We held only that we have jurisdiction over petitions for expungement in certain narrow circumstances – namely, where the "predicate for the expunction is a challenge to the validity of either the arrest or conviction." *Id.* at 957. We noted that the instances in which courts had previously granted expungement were those "in which a court invoked its inherent power to remedy an acquittal, an unconstitutional conviction or an abuse of power." *Id.* We noted that we found no cases in which expungement had "been ordered (1) where the circumstances of conviction have not been challenged, or (2) on the basis of a pardon following an unchallenged or otherwise valid conviction." *Id.* In cases where expungement

was warranted, we applied "a balancing test in which the harm to the individual caused by the existence of the records is weighed against the governmental interest in maintenance of the records." *Id.* Because we found Noonan's argument that his pardon "blot[ted] out of existence [his] guilt" unconvincing, we declined to apply the balancing test to his case. *Id.* at 955 (internal quotation marks omitted).

The cases upon which *Noonan* relied support our conclusion here that we have jurisdiction over petitions for expungement in narrow circumstances: where the validity of the underlying criminal proceeding is challenged. In *United States v. Friesen,* the court stated that only "unusually compelling circumstances . . . justify the exercise of the trial court's 'narrow' power to order expunction." 853 F.2d 816, 818 (10th Cir.1988). Because the trial court had granted a petition for expungement without a finding of unusual circumstances, the Court of Appeals for the Tenth Circuit reversed the grant. Similarly, in *United States v. McMains*, the court stated, "It is established that the federal courts have inherent power to expunge criminal records when necessary to preserve basic legal rights. The power is a narrow one, usually exercised in cases of illegal prosecution or acquittals and is not to be routinely used." 540 F.2d 387, 389-90 (8th Cir.1978) (citations omitted). Nearly all of the cases the *McMains* court cited in support of its conclusion that district courts have jurisdiction over petitions for expungement challenged the legality of the underlying criminal proceeding.[1]

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[1] *See Menard v. Saxbe,* 498 F.2d 1017 (D.C.Cir.1974) (holding that expungement of arrest record from FBI files appropriate where law enforcement officers lacked probable cause to arrest defendant);

(Continued on following page)

Our narrow holding in *Noonan* does not conflict with our holding in *Dunegan* as Rowlands vigorously argues. In *Dunegan,* we addressed the question of whether this court had "jurisdiction . . . to entertain . . . a petition [for expunction] *in the absence of a challenge to the legality of the conviction* or arrest." 251 F.3d at 479 (emphasis added). Dunegan was a police officer who had been indicted for violating a suspect's civil rights. He was subsequently tried and acquitted. Dunegan did not contend that his indictment was invalid or legally infirm for any other reason. The *Dunegan* court expressly did not "consider . . . whether a record may be expunged on the basis of Constitutional or statutory infirmity in the underlying criminal proceedings or on the basis of an unlawful arrest or conviction." *Id.* at 480. It is evident, therefore, that our holding in *Noonan* – that we have jurisdiction to consider expungement where the underlying criminal proceeding is being challenged – does not contradict *Dunegan.*

Notwithstanding our holdings in *Noonan* and *Dunegan,* Rowlands urges this court to follow, inter alia, *United States v. Johnson,* 714 F.Supp. 522 (S.D.Fla.1989), and *United States v. Doe*, 935 F.Supp. 478 (S.D.N.Y.1996). In *Johnson,* the court granted a petition for expungement because Johnson was acquitted and retention of his

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Sullivan v. Murphy, 478 F.2d 938 (D.C.Cir.1973), *cert. denied,* 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1974) (finding expungement of records of mass arrests appropriate where established procedures broke down so that there was no showing of probable cause); *United States v. McLeod,* 385 F.2d 734 (5th Cir.1967) (finding expungement of criminal records appropriate when arrests were made for purpose of interfering with right to vote). The one exception is *Chastain v. Kelley,* 510 F.2d 1232 (D.C.Cir.1975). In that case, the petitioner, an FBI agent, sought expungement of the administrative record regarding his dismissal after the FBI reversed its decision to dismiss him.

criminal records would result in the denial of future jobs. In Doe, the court granted a petition for expungement in similar circumstances. These cases are unconvincing. They are not from this Circuit, and our precedent clearly establishes that we have jurisdiction over petitions for expungement only when the validity of the underlying criminal proceeding is challenged. Because Rowlands has not attacked the validity of the underlying conviction, we reject his contention that we have inherent jurisdiction over his petition for expungement.

III.

Rowlands's alternative contention that the All Writs Act, 28 U.S.C. § 1651, grants federal district courts the legal authority to expunge the record of a legal and valid criminal conviction is also unavailing. The All Writs Act, in pertinent part, provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "[A] court of appeals has the power, under the 'all writs' act, to issue a writ . . . 'where it may be necessary for the exercise of a jurisdiction already existing.'" *United States v. Brooks,* 230 F.3d 643, 646 n. 3 (3d Cir.2000) (citing *Whitney v. Dick,* 202 U.S. 132, 136-37, 26 S.Ct. 584, 50 L.Ed. 963 (1906)); *see also Syngenta Crop Prot., Inc. v. Henson,* 537 U.S. 28, 33, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002). We concluded above that we do not have jurisdiction over Rowlands's petition. The All Writs Act does nothing to alter our conclusion.

Rowlands unconvincingly argues that other courts have found authority to grant petitions for expungement

pursuant to the All Writs Act. He cites to *United States v. Javanmard,* 767 F.Supp. 1109 (D.Kan.1991), and *United States v. Bohr,* 406 F.Supp. 1218 (E.D.Wis.1976), in support of this contention. In *Javanmard,* the court granted a petition for expungement of a criminal conviction pursuant to a guilty plea because the record of the conviction would preclude the petitioner from availing himself of the amnesty provisions of the Immigration Reform and Control Act. The court found that it had jurisdiction over the petition for expungement and invoked the All Writs Act in aid of that jurisdiction. In *Bohr,* the court granted a petition for expungement where the petitioner was a lawyer whose legal practice was severely hindered by the record of his conviction.[2]

Neither of these cases provides any support for Rowlands's contention. First, we have concluded we lack jurisdiction over his petition. Second, both *Javanmard* and *Bohr* have been superseded by appellate authority from the applicable courts of appeals. In *United States v. Pinto,* 1 F.3d 1069 (10th Cir.1993), the Court of Appeals for the Tenth Circuit (which includes the District of Kansas) held that it lacked authority to expunge the petitioner's conviction for filing false tax returns. The petitioner did not challenge the validity of her conviction but contended that the record of the conviction impeded her from finding employment. The court held that the trial court "was without power to grant this petition." *Id.* at 1070. It also rejected the All Writs Act as a source of jurisdiction over Pinto's petition: "While we agree that the All Writs Act plays a part in enabling the court to issue the writs . . .

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[2] The relevance of the All Writs Act to the holding in *Bohr* is unclear. The court cites the Act in passing without any discussion.

necessary to accomplish an actual expungement, we believe that the authority to consider the issue in the first place is not contained in that Act." *Id.* at 1070 n. 1. *Pinto* clearly rejects the reasoning in *Javanmard.*

Similarly, in *United States v. Flowers,* 389 F.3d 737 (7th Cir.2004), the Court of Appeals for the Seventh Circuit (which includes the District of Wisconsin) held that expungement is not available to remedy "adverse consequences which attend every arrest and conviction. Those are unfortunate but generally not considered *unwarranted* adverse consequences. It is possible, even likely, that any person with an arrest or conviction record may well be impeded in finding employment." *Id.* at 739. As an example of "*unwarranted* adverse consequences," the court cited to *McLeod,* in which the Court of Appeals for the Fifth Circuit ordered expungement of records of arrests made in order to harass. See *United States v. McLeod,* 385 F.2d 734 (5th Cir.1967). Under *Flowers,* the analysis in *Bohr* is incorrect. A defendant's difficulty in finding or retaining employment is a common consequence of conviction and does not constitute grounds for expungement.

Because we agree that there is no jurisdiction over Rowlands's petition for expungement, we will affirm the District Court's dismissal.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	CRIMINAL No. 81-245(JCL)
-v-	
DAVID C. ROWLANDS	MEMORANDUM & ORDER
Defendant	(Filed Jun. 9, 2005)

LIFLAND, DISTRICT JUDGE

Defendant moves for expungement of his criminal record. He was convicted while serving as the Mayor of Kearny, New Jersey in 1982. fie was sentenced to eight years in prison, but only served ten months because the trial judge reduced his sentence, Mr. Rowlands provided significant cooperation in the investigation and prosecution of others.

Mr. Rowlands argues that expungement is appropriate given (1) the passage of time without any further incidents, (2) the opinions of the District Judge and the prosecutor, (3) the fact that his conduct leading to his conviction was aberrant, (4) the continuing detriment to him of his conviction, and (5) the benefit to society which he can provide through the provision of teaching services in New Jersey.

Mr. Rowlands relies on the inherent equitable power of the Court and upon the All Writs Act, 28 U.S.C. § 1651, as jurisdictional predicates for considering the merits of his petition under the circumstances presented here.

The Government resists expungement, and takes the position that controlling law in this Circuit deprives the

Court of jurisdiction to expunge Mr. Rowlands' criminal record.

A. Inherent Equitable Power

In this proceeding, as in all proceedings, the threshold inquiry is whether the court has jurisdiction to grant the requested relief. The decision of the Court of Appeals for the Third Circuit in *United States v. Dunegan*, 251 F.3d 477 (3d Cir. 2001) is controlling authority in this Circuit for the proposition that this Court has no inherent power, and therefore lacks jurisdiction, to grant the relief requested by Mr. Rowlands, notwithstanding an earlier decision of the Court of Appeals for the Third Circuit, *United States v. Noonan*, 906 F.2d 952 (3d Cir. 1990), which is relied upon by Mr. Rowlands as supporting this Court's power to grant the relief requested.

In *Dunegan*, the Court of Appeals vacated an order, denying expungement relief and remanded to the District Court with instructions to dismiss the petition for want of jurisdiction. The Court held that its limited inherent powers could not serve as the basis for jurisdiction over the petition, and that in the absence of any applicable statute enacted by Congress or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have jurisdiction to expunge a criminal record, even when ending in an acquittal. *Id.* at 480. Here, there is no contention that any statute specifically permits expungement, nor is there any contention that Mr. Rowlands' conviction was invalid or illegal. *Dunegan* is therefore controlling.

Mr. Rowlands argues that *Dunegan* is not controlling, and that this Court has jurisdiction, because in *Noonan*,

the Court of Appeals for the Third Circuit exercised jurisdiction over a petition for expungement. In those circumstances, it is argued, this Court must follow the earlier panel decision of the Court of Appeals.

In *U.S. v. Monaco*, 23 F.3d 793 (3d Cir. 1994), the Court stated:

> Internal Operating Procedure 9.1 sets forth our judicial tradition that no panel of this court may overrule the holding of a previous panel. Only the *in banc* court may do that. To the extent that the decision of a later panel conflicts with existing circuit precedent, we are bound by the earlier, not the later, decision.

Mr. Rowlands argues that the conflict between *Noonan* and *Dunegan* is clear, in that *Noonan* decided that the District Court and the Court of Appeals had jurisdiction to consider a petition for expungement, while *Dunegan* held to the contrary. Mr. Rowlands argues, as to *Noonan*, that

> "Had there been a lack of power to award an expungement, this lack of power, not the effect of a pardon, would have formed the basis of the Court's decision."

It is not so clear to this Court that the *Noonan* panel concluded that it had subject matter jurisdiction over a petition for expungement under all circumstances. While stating that a federal court has the inherent power to expunge an arrest and conviction record, the *Noonan* panel went on to discuss the circumstances under which that power could be exercised. It discussed cases addressing these circumstances and concluded:

> "But these are all instances in which a court invoked its inherent power to remedy an acquittal, an unconstitutional conviction or an abuse of power. *Noonan's* conviction does not fit within these perimeters." 906 F.2d at 957.

It also noted that in none of the recorded cases had expunction been ordered where the circumstances of conviction were not challenged. There is no challenge to the conviction in Mr. Rowlands' application. The *Noonan* panel then went on to characterize the District Court's job and its own job as solely to determine a question of law.

In *Dunegan*, when confronted with *Noonan*, the panel observed that the District Court in *Noonan* was called on solely to determine whether the Presidential pardon entitled the petitioner to expunction of the record of his conviction. The Court stated that:

> "The question of the jurisdiction of the [*Noonan*] court to entertain such a petition in the absence of a challenge to the legality of the conviction or arrest was never raised." 251 F.3d at 479

It is certainly true that the *Noonan* panel was called upon to resolve a question of law and did so. It is also true that the *Noonan* court, in reciting the kinds of cases in which a petition for expunction could go forward, was impliedly rejecting jurisdiction to consider such a petition where (as here) there is no challenge to the legality of the conviction.[1] Thus, it may not be quite true that the *Noonan*

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[1] *U.S. v. Sumner*, 226 F.3d 1005 (9th Cir. 2000) explicitly drew this distinction; a district court's ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error.

court necessarily found it had jurisdiction simply because it decided the case.

Next, and of substantial significance, the IOP referred to above would not apply when there is an intervening legislative change or binding judicial decision which adversely affects the viability of the earlier panel decision. In the context of this case, an intervening binding judicial decision occurred. *Dunegan*, referred to the intervening judicial decision of the Supreme Court of the United States in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994). That decision reiterated that federal courts are courts of limited jurisdiction, without power to expand their own power, and without jurisdiction except where authorized by the Constitution or statutes. With that limiting interpretation of judicial power, subsequent to *Noonan* but prior to *Dunegan*, this Court would not be bound by an earlier panel decision asserting expansive jurisdiction. In other words, the intervening Supreme Court decision has mooted any possible conflict between the two panel decisions.

Finally, where the later panel decision considers and characterizes the earlier panel decision as a decision of a legal question not embracing jurisdiction, this Court feels itself bound by the later panel decision, which specifically denies jurisdiction. Accordingly, absent a clear conflict between the panel decisions, such as was referred to in *United States v. Monaco*, this Court regards itself as bound by *Dunegan* and concludes that it does not have jurisdiction to entertain the petition for expungement.

B. The All Writs Act

Mr. Rowlands also relies on the All Writs Act, 28 U.S.C. § 1651, and cites some cases that support its position that the All Writs Act allows a federal court to expunge a record of conviction, even in the absence of a defect in that conviction. See *United States v. Javanmard*, 767 F. Supp. 1109 (D. Kan. 1991) and *United States v. Bohr*, 406 F. Supp. 1218 (E.D. Wisc. 1976).

28 U.S.C. § 1651 (a) provides, in pertinent part, that

> "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Initially, it is hard to see how a writ "in aid of . . . jurisdiction" can be available when, as discussed above, the Court has determined that it does not have jurisdiction to grant the requested relief. In other words, as argued by the Government, the All Writs Act is to some extent a codification of mechanisms by which the Court exercises its inherent jurisdiction.

In *dicta, United States v. Sumner, supra*, footnote 1, refers to the statutory authority, under the All Writs Act, of a district court to issue a writ of error *coram nobis* to correct an unlawful conviction when, for example, the custody requirement for a writ of *habeas corpus* cannot be met. However, *Sumner* was not an All Writs Act case; it held that district courts possess ancillary jurisdiction to expunge criminal records which flows from the congressional grant of jurisdiction to hear cases involving offenses against the United States pursuant to 18 U.S.C. § 3231,

but not with respect to a valid arrest and conviction and solely for equitable considerations.

United States v. Pinto, 1 F.3d 1069 (10th Cir. 1993), is factually on all fours with this case and is instructive. Defendant in that case found that her status as a convicted felon disrupted many aspects of her life, including employment, and she moved in the district court to expunge her conviction, claiming that she had been punished enough. The Court of Appeals held that the district court was without power to grant the petition, because there was no statutory authority for expunction. Thus, the Tenth Circuit rejected the availability of the All Writs Act as such statutory authority, and held that "any authority to order expungement must stem from the inherent equitable powers of the court" (1 F.3d at 1070). In footnote 1, the Court rejected *United States v. Bohr, supra*, as authority for the proposition that the All Writs Act represented a statutory grant of the power of expungement. It stated:

> "While we agree that the All Writs Act plays a part in enabling the court to issue the writs of error coram nobis and the writs of mandamus necessary to accomplish an actual expungement, we believe that the authority to consider the issue in the first place is not contained in that Act. Rather, if it exists at all, it is a function of the inherent equitable power of the court."

As indicated earlier, in the Third Circuit the inherent equitable powers of this court do not extend to granting expungement of the records of a valid conviction and sentence. Under *Pinto*, with which this Court agrees, neither does the All Writs Act.

For the foregoing reasons, Mr. Rowland's application for expunction of his 1982 conviction is denied.

/s/ John C. Lifland, U.S.D.J.

DATED: June 9, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 05-3425

UNITED STATES OF AMERICA
v.
DAVID C. ROWLANDS,
Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, Circuit Judges and DuBOIS,* District Judge

The petition for rehearing filed by Appellant David C. Rowlands in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

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* Hon. Jan E. DuBois, Senior Judge, United States District Court for the Eastern District of Pennsylvania, as to panel rehearing only.

Dated: July 10, 2006

CMH/cc: FM, MEC, DBL, GSL___

109th CONGRESS, 1st Session

United States Library of Congress

HR 662
Introduced in House
February 8, 2005

H. R. 662

To permit expungement of records of certain nonviolent criminal offenses.

IN THE HOUSE OF REPRESENTATIVES
February 8, 2005

Mr. **RANGEL** introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To permit expungement of records of certain nonviolent criminal offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Second Chance for Ex-Offenders Act of 2005'.

SEC. 2. EXPUNGEMENT OF CRIMINAL RECORDS FOR CERTAIN NONVIOLENT OFFENDERS.

(a) In General – Chapter 229 of title 18, United States Code, is amended by inserting after subchapter C the following new subchapter:

'SUBCHAPTER D – EXPUNGEMENT

'Sec.

'3631. Expungement of certain criminal records in limited circumstances.

'3632. Requirements for expungement.

'3633. Procedure for expungement.

'3634. Effect of expungement.

'3635. Reversal of expunged records.

'3636. Unsealing of records.

'Sec. 3631. Expungement of certain criminal records in limited circumstances

'(a) In General – Any Individual convicted of an nonviolent offense who fulfills the requirements of section 3632 may file a petition under this subchapter to expunge the record of such conviction.

'(b) Definition of Nonviolent Offense – In this subchapter, the term 'nonviolent offense' means a misdemeanor or felony offense against the United States that does not have as an element of the offense the use of a weapon or violence and which did not actually involve violence in its commission.

'Sec. 3632. Requirements for expungement

'No individual shall be eligible for expungement under this subchapter unless, before filing a petition under this subchapter, such individual –

'(1) has never been convicted of a violent offense (including an offense under State law that would be a violent offense if it were Federal) and has never been convicted of a nonviolent offense other than the one for which expungement is sought;

'(2) has fulfilled all requirements of the sentence of the court in which conviction was obtained, including completion of any term of imprisonment or period of probation, meeting all conditions of a supervised release, and paying all fines;

'(3) has remained free from dependency on or abuse of alcohol or a controlled substance a minimum of 1 year and has been rehabilitated, to the satisfaction of the court referred to in section 3633(b), if so required by the terms of a supervised release;

'(4) has obtained a high school diploma or completed a high school equivalency program; and

'(5) has completed at least one year of community service, as determined by the court referred to in section 3633(b).

'Sec. 3633. Procedure for expungement

'(a) Petition – An individual may file a petition for expungement in the court in which the conviction was obtained. A copy of the petition shall be served by the court upon the United States Attorney for the district in which the conviction sought to be expunged was obtained. Not later than 60 days after receipt of such petition, the United States Attorney may submit written recommendations to the court and notify the petitioner of that recommendation.

'(b) Court-Ordered Expungement – The court, after consideration of evidence submitted by the petitioner in support of the petition and any evidence submitted by the Government in support of objections it may have to granting the petition, shall rule on the petition. In making that ruling the court, after determining whether the petitioner meets the eligibility requirements of this subchapter, shall weigh the interests of the petitioner against the best Interests of justice and public safety.

'Sec. 3634. Effect of expungement

'(a) In General – An order granting expungement under this subchapter shall restore the Individual concerned, in the contemplation of the law, to the status such individual occupied before the arrest or Institution of criminal proceedings for the crime that was the subject of the expungement.

'(b) No Disqualification; Statements – After an order granting expungement of any individual's criminal records under this subchapter, such individual shall not be required to divulge information pertaining to the expunged conviction and the fact that such individual has been convicted of the criminal offense concerned shall not –

'(1) operate as a disqualification of such individual to pursue or engage in any lawful activity, occupation, profession, and

'(2) held under any provision of law guilty of perjury, false answering, or making a false statement by reason of his failure to recite or acknowledge such arrest or institution of criminal proceedings, or results thereof, in response to an inquiry made of him for any purpose.

'(c) Records Expunged Or Sealed – Upon order of expungement, all official law enforcement and court records, including all references to such person's arrest for the offense, the institution of criminal proceedings against him, and the results thereof, except publicly available court opinions or briefs on appeal, shall be expunged (in the case of nontangible records) or gathered together and sealed (in the case of tangible records).

'(d) Record of Disposition to Be Retained – A nonpublic record of a disposition or conviction that is the subject of an expungement order shall be retained only by the Department of Justice solely for the purpose of use by the courts in any subsequent adjudication.

'Sec. 3635. Disclosure of expunged records

'(a) Law Enforcement Purposes – The Department of Justice may maintain a nonpublic manual or computerized index of expunged records containing only the name of, and alphanumeric identifiers that relate to, the persons who are the subject of such expunged records, the word 'expunged', and the name of the person, agency, office, or department that has custody of the expunged records, and shall not name the offense committed. The index shall be made available only to Federal and State law enforcement personnel who have custody of such expunged records and only for the purposes set forth in subsection (b) of this section.

'(b) Authorized Disclosure – Such records shall be made available to the person accused or to such person's designated agent and shall be made available to –

'(1) any prosecutor, law enforcement agency, or court which has responsibility for criminally investigating, prosecuting, or adjudicating such individual;

'(2) any State or local office or agency with responsibility for the issuance of licenses to possess guns where the accused has made application for such license; or

'(3) any prospective city, State, or Federal employer or agency, involved in investigating and/or prosecuting under criminal or civil statutes including employers of police or peace officers and in relation to an application for employment as an employee of a city, State, or Federal employer or agency involved in investigating or prosecuting under criminal or civil statutes including as a police officer or peace officer, and every person who is an applicant for the position of police officer, peace officer, or any other prospective city, State, or Federal employer or agency, involved in investigating or prosecuting under criminal or civil statutes shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto.

'(c) Punishment for Improper Disclosure – Any person who knowingly disseminates information relating to an expunged conviction other than the offender shall be fined under this title or imprisoned not more than one year, or both.

'Sec. 3636. Reversal of expunged records

'The records expunged under this subchapter shall be restored by operation of law as public records and may be used in all court proceedings if the individual whose

conviction was expunged is subsequently convicted of any Federal or State offense.'.

(b) Clerical Amendment – The table of subchapters at the beginning of chapter 229 of title 18, United States Code, is amended by adding at the end the following item:

– 3631'.

(c) Effective Date – The amendments made by this Act shall apply to individuals convicted of an offense before, on, or after the date of enactment of this Act.